89-1300

NO

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

TIMOTHY SMITH,

Petitioner

VERSUS

STATE OF LOUISIANA

Respondent

APPLICATION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

ROBERT H. BELKNAP
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New Orleans, Louisiana 70130
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QUESTIONS PRESENTED

1. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANTS REQUESTED JURY CHARGES AND THE JURY APPLIED IMPROPER STANDARDS.

2. THE SEARCH WARRANT ISSUED IN THIS MATTER WAS NOT PROPERLY SOUGHT OR APPLIED FOR AND THE COURT ERRED IN NOT GRANTING DEFENDANTS MOTION TO SUPPRESS.

3. THE TRIAL COURT ERRED IN NOT ORDERING THE PROSECUTION TO COMPLY WITH REQUESTED DEFENSE DISCOVERY.

4. APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL DUE TO THE PROSECUTIONS SUMMARY RECUSAL OF ALL POTENTIAL MALE JURORS.

5. THE COURT ERRED IN FAILING TO GRANT THE MOTION TO QUASH.

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CITATION OF AUTHORITIES

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_____ _____

NO.

TIMOTHY SMITH,
PETITIONER
VERSUS
STATE OF LOUISIANA

ON APPEAL FROM THE DENIAL OF THE SUPREME COURT, STATE OF LOUISIANA NEW ORLEANS, LOUISIANA

APPLICATION FOR WRIT OF CERTIORARI FOR PETITIONER, TIMOTHY SMITH

OPINIONS BELOW

The opinion of the Criminal District Court for the Parish of Orleans, Section J is unreported and contained in App. 1. The opinion of the Fourth Circuit Court of Appeals for the State of Louisiana, is reported at 543 So.2d 555 and also contained in the appendix commencing on page App. 6. The Louisana Supreme Court denied application for writ of Certiorari

and the denial thereof is contained in the appendix page App. 26.

JURISDICTION

The judgment of the Criminal District Court for the Parish of Orleans was entered on November 13, 1986. The appeal to the Fourth Circuit, Court of Appeal, State of Louisiana, was filed on the 9th of September, 1988 and granted. The Court of Appeals affirmed the Trial Court's decision. An application for writs to the Supreme Court of Louisiana was filed on May 26, 1989 and denied on October 13, 1989. Four Justices denied the writ and three Justices of the Louisiana Supreme Court would grant the writ. A Motion for Extension of Time to File the Application for Writ of Certiorari to this Honorable Court was filed on December 13, 1989, and granted. An application was filed with the court,

however due to improper format, leave was granted until February 7, 1990 within which to file this application. The jurisdiction of this Court is invoked under 28 USC Section 1291.

STATEMENT OF THE CASE

Applicant, TIMOTHY SMITH, was arrested on the 11th day of July 1986, for a violation of LSA R.S. 14:106, relative to the crime of obscenity. Charges were filed on the 8th day of August 1986, and Applicant was arraigned on the 9th day of October, 1986, discovery pleadings were filed by defense on October 23, and heard by the court on October 27, 1986. On November 13, 1986 the matter was tried before an all female jury and the appellant was found guilty. It is from this ruling that appellant appeals.

QUESTIONS PRESENTED

1. THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANTS REQUESTED JURY CHARGES AND THE JURY APPLIED IMPROPER STANDARDS.

2. THE SEARCH WARRANT ISSUED IN THIS MATTER WAS NOT PROPERLY SOUGHT OR APPLIED FOR AND THE COURT ERRED IN NOT GRANTING DEFENDANTS MOTION TO SUPPRESS.

3. THE TRIAL COURT ERRED IN NOT ORDERING THE PROSECUTION TO COMPLY WITH REQUESTED DEFENSE DISCOVERY.

4. APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL DUE TO THE PROSECUTIONS SUMMARY RECUSAL OF ALL POTENTIAL MALE JURORS.

5. THE COURT ERRED IN FAILING TO GRANT THE MOTION TO QUASH.

ARGUMENT

MAY IT PLEASE THE COURT, the appellant herein, a mere ticket taker, was employed at the Cine Royale Theater in the City of New Orleans, was charged and convicted of the crime of obscenity, a felony.

THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANTS REQUESTED JURY CHARGES AND THE JURY APPLIED IMPROPER STANDARDS FOR THE FILM.

Appellant in this matter submitted a request for jury charges which were not granted by the trial court, the denial of which coupled with the courts comments during trial created a wrong standard of determining the contemporary community standard.

The Louisiana Supreme Court has stated that the statute is not constitutionally vague for failure to define community standards in upholding the Louisiana obscenity statute in **State v Amato**, 343 So 2d, 698 (La 1977) Justice Dennis on page 702 stated as follows:

> "Furthermore, in **Miller** and the cases following it, the U.S. Supreme Court has made it clear that a state may choose to define an obscenity offense in terms of contemporary 'community standards' without further specifications, as Louisiana has done, this permitting juries to rely on the understanding of the community from which they come as to contemporary community standards; or a state may choose to define the

> standards in more precise geographical terms, as has been done in other jurisdictions."

It would be improper to limit the "community" in the manner indicated in the jury instructions which the trial court set forth.

A panel of the Louisiana Fourth Circuit Court of Appeals has gone even further, holding that anything less than a state-wide standard, such as the parish standard employed by the trial court in this case is improper. **State v. LeBlang**, 530 So. 2d 601 (La App, 4 Cir. 1988).

Judge Plotkin of the panel in the **LeBlang** case realized the peculiar problems of a major metropolitan area and on page 605 of the opinion states:

> "Other state courts have gone even further, holding that anything less that a state-wide standard, such as the parish standard employed by the trial court in this case is improper. Especially pertinent is the

> language of the Supreme Court of Wisconsin in **Court v. State**, 63 Wis.2d 570, 217 N.W.2d 676 (1974), which stated that "county standards would present a problem since some communities cut across county lines." **Id** at 577, 217 N.W.2d at 679. Use of a county standard, the court stated, would result in 'areas where portion of what clearly are recognizeable as integrated local communities would be governed by different standards. What would be not be obscene on one side of the street might be obscene on the other.'
>
> This is precisely the problem with applying parish standards in the New Orleans metropolitan area."

In his opinion, Judge Plotkin pointed out that this is not an isolated view and cited cases from Alabama, **Pierce v. State,** 292 Ala. 473, 296 So.2d 218, (1974), **cert denied nom**, **Ballew v. Alabama**, 419 U.S. 1130, 95 S.Ct. 816, 42 L.Ed.2d 830 (1975) N.W.2d 676 (1974); New York, **State v. P.J. Video, Inc.**,68 N.Y. 296, 508 N.Y.S.2d 907, 501 N.E.2d 156 (1987), Colorado, **People v. Tabron**, 190

Colo. 161, 544 P.2d 380 (1976), and Texas, **Brewer v. State,** 639 S.W.2d 441 (Tex.Crim.App.1982).

For a large portion of its citizens, the parish lines are nothing more than meaningless governmental jurisdictional boundaries which are crossed in both directions as the citizen leads his daily life, sleeping in one parish, working in another. Thus, it is quite conceivable, if not probable, that when a juror in Orleans Parish is called upon to determine the standards of the community in which he lives his vision of the community is broader than the confines of the parish. The jury's right to make such determinations under the letter of Louisiana obscenity statute should not have been limited by the judge's instructions.

On page 29 of the trial transcript, defense counsel was cross examining Detective Riley as to conduct and or depictions in other films shown on television, and was endeavering to show what is available in the open community, which question was objected to by the prosecution and sustained by the Court. The Court commencing on line 28 stated:

> "I'm not going to argue, Mr. Belknap, but they can decide--- they are the community and they will decide the standards they wish to apply in light of the definition I will give them. It is not going to be a comparison between this movie or that movie. I don't find that to be proper..."

Not only did the Judge incorrectly state that **they are the community**, he further advised the jury that **they will decide the standards they wish to apply.** The jury's function was to determine the contemporary community standard, not that they were the community and that they

would in effect set their own standards. This statement by the court before the jury not only is incorrect, it in effect gave the jury a license to do as it pleased. It is submitted that this is totally contrary to the law as stated in **State v. Wrestle, Inc.**, Sup. 1978, 360 So. 2d 831, 99 S.Ct. 1623, 441 U.S. 130, 60 L.Ed. 2d 96, on remand 371 So. 2d 1165, (**State v. Burch**, Sup. 1978, 365 So. 2d. 1263) but the test is to be an external test and not one based on the trier of facts personal knowledge as stated by the Court.

In addition to the prejudicial statement by the court, the exclusion of that testimony had at least two additional effects upon this hearing, one the exclusion of evidence of what is being shown in Jefferson Parish (a suburb of New Orleans) and the other being the

deprivation of the defendant to testify as what he thought was legal versus unlawful conduct. As a result of the latter, the defendant in effect felt that the issue of scienter could not be addressed by him. If he can not testify as how he arrived at a decision of determining in his own mind what is legal versus illegal conduct then in effect he is prohibited from testifying. The tapes were rented and secured from several outlets in Jefferson Parish and St. Bernard Parish. Additionally, the judge by his ruling not only limited the jurors from excluding evidence from the metropolitan area but even stated that the jury will determine the standard they wish to apply. This is clearly erroneous as it is not the jury's standard that is applicable but the jury deteriming the

contemporary community standard. Judge Plotkin in **LeBlanc supra**, on page 606 stated the applicable test as being as follows:

> "In order to determine the probability that the instruction materially affected the deliberations of the jury, we must look at the instruction in light of the purpose of the "contemporary community standard: test, has been described by the Louisiana Supreme Court as follows:
>
> 'to emphasis the need for external standard, as compared with the trier of facts personal views of decency, and to prevent the evaluation of obscenity being based on whether the material had an adverse effect on any particularly susceptible subclass of the community.' **State v. Wrestle Inc.**, 360 So.2d 831, 834 (La 1978), rev'd in part on other grounds **sub nom**, **Burch v La**, 441 U.S. 130, 99 S.Ct. 1623, 60 L. Ed. 2d 96 (1979) citing **Roth supra**, 354 U.S. at 488-491, 77 S.Ct. at 1310-1312."

The court again on page 74 line 27 of the trial transcript prohibited testimony from Dr. Morse from being admitted as to what is being depicted in

other films and or other means of media. This placed the jury in a posture where they would infer that they and they alone would determine the value of the film and not apply the test as set forth in defendant's requested jury charges taken from **Miller v. California**, 413 U.S. 15, 37 L.Ed 419, 93 S.Ct. 2607, and **Pope v. Illinois**, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439.

Petitioner had secured through periodicals a copy of the opinion in **Pope supra** and had even in pretrial motions addressed a number of the issues raised in this decision. The trial court refused to adopt the standards set forth in **Pope** and further refused to give the pertinent and applicable jury charge. The **Pope** test was obviously of great import to the defendant as he had available to him the head of the

department of Sociology of Tulane University who was called to testify in this matter. He was prohibited in testifying as to the history and study of the defendant which was a predicate to the defendant being able to testify (page 60 of trial transcript) and is certainly a reasonable man and should have been allowed to testify as to his findings of the film, which was denied page 72, line 15 of the trial transcript.

Appellant had called Dr. Edward Morse to the stand as an expert witness in the field of Sociology to testify as to the community standard, again the court refused to allow this testimony (page 72 of trial transcript) which testimony clearly was relevant and admissible. The Louisiana Supreme Court in **State v. Short**, Sup. 1979, 368 So. 2d. 1079, cert. denied 100 S. Ct. 174,

444 U.S. 884, 62 L. Ed. 2d 113, addressed the issue of lay testimony and in its dicta clearly stated (p.1081):

> "Relevant expert testimony may be admissible to prove community standard."

In spite of this dicta and in spite of the statuatory provisions of La.R.S. 15:464, the expert opinion was not admitted even though the witness, Dr. Morse (incorrectly referred to as Dr. Morris) was qualified as an expert witness in the field of sociology. Justice Tate of the Louisiana Supreme Court even stated on page 1082 of the opinion **in short**:

> "However, it is difficult to imagine how community acceptance of material could be shown without first discussing the availability of the material. Therefore, the trial judge should perhaps have allowed the witness to answer the question concerning materials that were available in the community."

Although the law as stated clearly would have allowed Dr. Morse to testify relative to these issues, the trial court refused to allow him to testify. That coupled with the improper statements by the court and the improper jury charge is submitted is clearly error and error of such magnitude that the defendant did not have a fair and impartial trial.

2.

THE SEARCH WARRANT ISSUED IN THIS MATTER WAS NOT PROPERLY SOUGHT OR APPLIED FOR AND THE COURT ERRED IN NOT GRANTING DEFENDANTS MOTION TO SUPPRESS.

During the hearings of this matter and the trial, appellant desired to show to the court and the jury that the police officer did not fulfill his duty by executing all prerequisites as required by law to obtain the arrest and search warrant. Appellant also desired to show to the court and jury, that the police

officer used a false and fictitious standard for the securing of a search and arrest warrant. That standard being the exhibition of sexual organs and or contact. This is clearly demonstrated on page 34 (A-180) of the trial transcript where the officer stated:

> "I didn't feel that it was necessary for the plot to the included in the warrant that was being initiated through pornographic material, a display of obscene material. I don't see where the plot has anything to do with the exhibition of sexual intercourse and the various sexual acts in the movie."

This type of arbitrary standard is clearly wrong and not only does it attempt to bypass a portion of the requirements of the statute as written ie. "that the film lacks serious literary, artistic, political or scientific value" but it creates an arbitrary standard which is unconstitutional **State v. Neal**, Sup.

1973, 279 2d 172. Such an arbitrary test is clearly a violation of the First Amendment of the United States Constitution. It seems the magistrate should have determined through an adversary hearing if the film or films were obscene in nature or not before issuing a search warrant.

3.

THE TRIAL COURT ERRED IN NOT ORDERING THE PROSECUTION TO COMPLY WITH REQUESTED DEFENSE DISCOVERY.

Appellant herein on the 23rd day of October, 1986, filed a motion for discovery consisting of 15 questions (the last two were incorrectly numbered) Of these, eight questions (VII., VIII., IX., X., XI., XII., XIII, and XIV) were objected to by the prosecution and the court did not require the prosecution to answer. It is submitted that the failure

to deny appellant the information sought in all except Number VII. deprived him of a fair trial. As the state did not call any expert witness, that question is moot. To deny the appellant however his Sixth Amendment rights deprives him of a fair and impartial trial.

In request number VI. appellant desired to know the names and addresses of all who had seen the movie since it came into custody of law enforcement agencies. Due to the fact that if the film has any value is a material issue, and that determination can be made by subjective standards, it is submitted that appellant was denied the right to call potential witnesses. Just as an appellant has a right in a murder case to know who he is alleged to have killed, so it is submitted in an obscenity hearing that the appellant has a right to know if

the film aroused anyone's prurient interest, and the appellant had the specific intent to arouse (**State v. Washington**, Sup 1982, 412 So.2d 991) lacked any value, was patently offensive etc. Particularly if the prosecution in its jury selection excludes all male members from the panel is it important to then secure this information through testimony. Furthermore, due to the fact that the statute calls for different punishment for various corporate officers, and or duties of the appellant, it certainly was and is relevant what the duties of the appellant were or are alleged to be at the time that the movie was shown. The appellant earned a certain wage or salary from the Cine Royale Theater and did not benefit from the profit of showing certain movies at

this theater. Particularly in this case where the prosecution failed to show any financial interest as required by the statute, **State v. Terrebonne**, Sup. 1977, 344 So. 1010.

In addition to the discovery request, the denial of the subpoena duces tecum denied the defense the opportunity to show community standards, alleged selective enforcement tactics employed and the issue of scienter. **State v Entertainment Specialists, Inc.**, (Sup. 1980) 386 So. 2d 653. The denial of this information in effect blocked the appellant from taking the stand in his own behalf to show how the conduct of other films, theaters, etc, versus what he was aware of in his environment (**State v. Burch**, Sup. 1978, 365 So. 2d 1263),. The element of a knowing and willful act was not only not shown by the

prosecution, but the prosecution prohibited the defense from showing that the appellant did not perpetrate a knowing act. **United States v. Smith**, 467 F. 2d 1126 (7th Cir. 1972), **Gagliardo v. United States**, 336 F. 2d. 720 (9th Cir. 1966).

4.

APPELLANT WAS DENIED A FAIR AND IMPARTIAL TRIAL DUE TO THE PROSECUTIONS SUMMARY RECUSAL OF ALL POTENTIAL MALE JURORS.

The prosecution in this case summary challenged all male jurors in a case involving a movie wherein scenes depict explicit sexual intercourse. The appellant is a male. The prosecuting attorneys were female and the prosecution excused each and every male member off the jury. Just as females are viewed as a class, males may also be put in a category as such. In this case, men were

discriminatorily excluded from serving on a jury by the tactics of the prosecution.

It also states in **Taylor v. La.**, 95 S. Ct. 692, 419 U.S. 522, 42 L. Ed. 2d 690 that:

> "Women as a class may not be excluded from jury service or given automatic exemptions based solely on sex in the consequence is that criminal jury venires are almost totally male disapproving...**Hoyt v. Florida**, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118, U. S. C. A. Cont. Amends. 6, 14"

Just as this type of selection or exclusion is prohibited as to race, it is submitted that as to a jury that must determine community standards, the appellant was denied a fair trial by the tactics of the prosecution in excluding males.

5.

THE COURT ERRED IN FAILING TO GRANT THE MOTION TO QUASH

Appellant filed a motion to quash

which included the statute as well as the bill of information. The bill of information merely stated that the appellant "did commit the crime of obscenity by selling, distributing, advertising, or displaying obscene material, to wit: A MOVIE ENTITLED 'LUST AT THE TOP' contrary to LSA-R.S. 14-106 (A)(3)". Due to the fact that the prosecution failed to provide the requested discovery, the vagueness of the bill of information certainly merits closer inspection. Due to the fact that no financial gain was charged, no arousal of prurient interest was charged nor any of the elements necessary to constitute a crime under the pertinent statute it is submitted that the bill was and is indeed vague and ambiguous and that under the criteria set forth in **City of New Orleans**

v. Glendora Hollis, Sup. 1976, 329 So. 2d 681, that the bill should be quashed. Additionally, as to any obscenity charge, the state knows that it cannot charge under the "short form" of the bill of information which is what the effect of the wording of the bill in the instant case amounts to. The court stated in **City of New Orleans v Owen**, 355 So. 2d 1297 as follows:

> "No where does it allege the particular conduct upon which the prosecution is based."

In a criminal prosecution, an accused has a constitutional right to be informed of the nature and cause of the accusation against him. Sixth Amendment to the United States Constitution, Article I, Section 13 of the Louisiana Constitution (1974).

The bill of information omitted the allegations of a financial gain and no

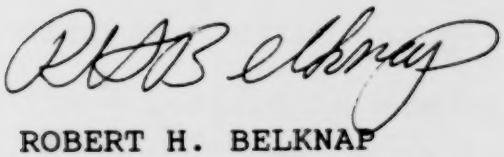
arousal of prurient interest, therefore the bill can be considered legally insufficient.

Appellant submits that the statute's punishment is excessive and therefore is cruel and unusual punishment which is unconstitutional.

CONCLUSION

Appellant submits that the above and foregoing errors deprived appellant of a fair and impartial trial and therefore, the judgment of the trial court should be reversed and the conviction of the appellant set aside. Appellant further desires to supplement the record in these proceedings as not all the information supplied in the appendixes is complete and/or correct.

Respectfully submitted,



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LIST OF PARTIES

Timothy Smith - Petitioner

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State of Louisiana

Harry H. Connick - Attorneys of Record District Attorney for the Parish of Orleans Janet Ahern Assistant District Attorney for the Parish of Orleans 619 South White Street New Orleans, Louisiana 70119

APPENDIX

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

State of La. NO. 315 -431

Versus VIO. R.S. 14:106

Timothy Smith

November 13, 1986

Defendant present this date Trial and represented by his attorney, Robert Belknap, Esq. Dale Atkins, Esq. and Rhonda Smith Esq. both ADA's, for the State of Louisiana. Motion to Quash Subpoena Duces Tecum was granted by the Court.

The Jury Voir Dired, and the following persons were selected as jurors in this matter:

1. Melva Williams
2. Lisa Welch
3. Wynethia Thompson
4. Ginny Zissis
5. Diane Sharper
6. Joyce Shields

The State used three (3) peremptory challenges and the Defense used two (2) peremptory challenges.

Opening statement for the State of Louisiana by Dale Atkins. Opening statement for the Defense by Robert Belknap, Esq. The Hon. Leon A. Cannizzaro, Jr. read the Formal Bill of Information.

Det. Warren Riley, duly sworn, testified for the State and was cross examined by the Defense and re-examined by the State. The State marked for id State's Exhibit No. 1 (Video Tape). The Defense marked for id Defense Exhibit No. 1 (Diagram.)

Det. Carlos Maza, duly sworn, testified for the State and was cross examined by the Defense. Defense marked for id Defense Exhibit No. 2 (Diagram.)

Video Tape of the movie in question, "Lust at the Top" was shown to the jurors and the Court.

The State offered, filed and introduced into the record the State's Exhibit No.1,

and the exhibit was admitted into the record without objection.

The state rested.

Dr. Edward D. Morse, duly sworn, was qualified as an expert in the field of Sociology and is capable of rendering an expert opinion in the field for which he has been tendered.

after being examined by the State and the Defense.

The Defense marked for id Defense Exhibits Nos. 3, 4, and 5. and the Court marked them for the record.

Dr. Edward D. Morse was examined by the Defense and cross examined by the State and re-examined by the Defense and re-crossed by the State.

Det. Wayne Jusselin, duly sworn, testified for the Defense and was cross examined by the State.

The State offered, filed, and introduced into evidence Defense Exhibits Nos. 3, 4, 5, and 6. The Court admitted Defense Exhibits Nos. 3, 4, 5, and 6 into the record over objections of the State.

The State and the Defense stipulated as to Defense Exhibit No. 7, and Defense Exhibit No. 7 was admitted into the record without objections.

The Defense rested.

Closing argument for the State of Louisiana by Rhonda Smith, E

Closing argument for the Defense by Robert Belknap, Esq.

Rebuttal argument for the State of Louisiana by Dale Atkins, E

The Hon. Leon A. Cannizzaro, Jr. charged the Jury. The Jury was out to deliberate at 5:15 p.m., and the Jury returned with a verdict of "Guilty as Charged" at 6:25 p.m. Set for Sentencing for Monday,

December 8, 1986, at 9:00 a.m, W.F.N. to the defendant.

STATE OF LOUISIANA	NO. 88-KA-1381
VERSUS	COURT OF APPEAL
TIMOTHY S. SMITH	STATE OF LOUISIANA

AN APPEAL FROM THE CRIMINAL DISTRICT COURT, THE PARISH OF ORLEANS NO. 315-431, SECTION "J", HONORABLE LEON A. CANNIZZARO

****

CHARLES R. WARD

JUDGE

****

(Court composed of Judges Philip C. Ciaccio, Charles R. Ward and Rudolph F. Becker, III)

Harry F. Connick

District Attorney

Janet Ahern

Assistant District Attorney

New Orleans, Louisiana

Attorneys for the State of Louisiana

Robert H. Belknap, P.C.

New Orleans, Louisiana

Attorney for Timithy Smith

AFFIRMED

Timothy Smith was charged with a violation of the obscenity law, R.S. 14:106(A)(3)1, for exhibiting a film entitled "Lust at the Top." After viewing the film, a 6 member jury unanimously convicted him as charged. He received a sentence of one year inactive probation, a $2,500 fine and was ordered to pay $100 in court costs or serve 30 days in lieu of payment of court costs.

1L.R.S. 14:106(A) (3) reads:

Section 106. Obscenity

> A. The crime of obscenity is intentional:
>
> (3) Sale, allocation, consignment, distribution, dissemination, advertisement, exhibition, or display of obscene material, or the preparation, manufacture, publication, or printing of obscene material for sale, allocation, consignment, distribution, advertisement, exhibition, or display.
>
> Obscene material is any tangible work or thing which the trier of fact determines (a) that the average person applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, and (b) depicts or describes in a patently offensive way, hard core sexual conduct specifically defined in Paragraph (2) above, and (c) the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value.

Smith appeals, relying on six assignments of error for reversal of his conviction and sentence.

In the course of a pornography

investigation, Officer Warren Riley went to the Cine' Royal Theater on Canal Street to view the movie "Lust at the Top." Riley paid Timothy Smith, a theater employee, for a ticket, entered and watched the movie. The film explicitly depicted men and women engaged in various sexual acts, including intercourse, fellatio and cunninglingus. Subsequently, Riley prepared and obtained warrants for Smith's arrest and confiscation of the film. Later that same day, two vice officers arrested Smith at the theater and seized the film which they found hidden in an inoperable ice machine.

Smith contends the Trial Court committed three errors during trial. First, Smith argues the Trial Court erred by refusing to charge the jury with his requested instructions. After charging

the jury with its own instructions, the Court asked the defense and State whether either had any requested instructions. Both responded negatively. Moreover, neither the minutes nor the record of proceedings reflect any requests for instructions prior to or during trial nor is there any indication the defense objected at the close of the Court's instructions. Smith's failure to make a contemporaneous objection precludes his assertion of this error on appeal. **State ex rel. Ross v. Blackburn**, 403 So.2d 719 (La. 1981); C.Cr.P. art. 801 and 841.

Smith also argues the Trial Court erred by denying Smith the opportunity to cross-examine Detective Riley about other films shown in the community. Relying on **State v. Wrestle,Inc.**, 360 So.2d. 831 (La. 1978), reversed in part on other

grounds sub nom, **Burch v. Louisiana**, 441 U.S. 130, 99 S.Ct. 1623 (1979). Smith contends this error encouraged the jury to judge the film based upon their personal values rather than upon an external or contemporary community standard.

The Court correctly maintained the State's relevancy objection. In **State v. Short,** 368 So.2d 1078 (La. 1979) the Supreme Court ruled that even if other materials sold or distributed by another store may be as bad or worse than that sold by the defendant, this does not render the defendant's material less obscene. Only a showing that the community accepts or tolerates the material--not merely a showing that such material is sold, or that it has not thus far been prosecuted--would be material evidence of contemporary community

standards of obscenity. **Hamling v. U.S.**, 418 U.S. 87, 94 S.Ct. 2887 (1974), rehearing denied 419 U.S. 885, 95 S.Ct. 157.

Smith next argues the Trial Court erred by excluding some of the testimony of a defense expert, Dr. Edward Morse, a sociologist, who testified about contemporary community standards. When the defense sought testimony describing films shown on cable television Playboy channel to show the basis of Dr. Morse's opinion, the Trial Court excluded that part of proffered testimony. Dr. Morse was allowed, however, to testify about his studies of the New Orleans community and to give his opinion that films similar to "Lust at the Top" were acceptable to contemporary community standards. Since the Court allowed Dr.

Morse to give his expert opinion and the basis of that opinion, except that part relating to other films, the exclusion of his testimony about "other films" was at best harmless error.

Moreover, the jury instructions prohibited juror's from basing their verdict on personal values. Instructing the jury on contemporary community standards, the Judge said:

> When we refer to 'contemporary community standards' we mean, that in determining whether the materials introduced at this trial or (sic) obscene or not, you are to consider what our local, general community standards are at large, at this time, are in this regard. Each juror is only entitled to draw on her personal knowledge of the view of the average person in the community, from which you come for making this required determination.

While a juror may not base his or her verdict on their personal values, a juror is entitled to draw on his own personal

knowledge of the views of the average person in the community in determining a violation of community standard. **Hamling**, supra. The instructions were clear, concise, and adequately informed the jury of the standards to be applied. The assignments of trial error are without merit.

Concluding the discussion of Smith's first assignment, the exclusion of the "other films" evidence did not encourage the jury to employ their personal values rather than a community standard in its obscenity determination.

Smith also contends the Trial Court erred in pretrial rulings. First, Smith contends the Trial Court erred by denying his motion to suppress the film. Citing **State v. Neal,** 279 So.2d 172 (La. 1973), he argues the affidavit in support of the

warrant provided the magistrate with insufficient evidence of probable cause to conclude Smith was displaying obscene material because the affidavit failed to recite the "plot" of the movie, and, as a consequence, the magistrate could not determine that the film "lacked serious literary, artistic, political or scientific value" as required by R.S. 14:106(A) (3).

Smith's reliance on the **Neal** case is misplaced. Unlike the warrant in this case, **Neal** dealt with a "blanket" or general search warrant for any obscene material which the Court found constitutionally deficient because the determination of obscenity rested within the sole discretion of the seizing officer. The search warrant in the present case listed only the described film as the property to be seized. **Neal**

does not support Smith's argument that the Magistrate must have an opportunity to evaluate the film as a whole and determine the film does not have any redeeming social value before issuing a warrant.

In applying for a search warrant, the police must supply factual information, not conclusionary allegations, sufficient to convince the magistrate that the material to be seized is probably obscene. **State v. B.G.N.O., Inc.** 371 So.2d. 776 (La. 1978).

The affidavit in support of the warrant application fully described sexual acts depicted in the film, all of which constitute "hard core sexual conduct", as defined in R.S. 14:06A(2)(b)2 and further stated that the acts occurred

---

2R.S. 14:06A(2) (b) reads:

> (b) Hard core sexual conduct is the public portrayal, for its own sake, and for ensuing commercial gain of:
>
> (i) Ultimate sexual acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being; or
>
> (ii) Masturbation, excretory functions or lewd exhibition, actual, simulated or animated, of the genitals, pubic hair, anus, vulva, or female breast nipples; or
>
> (iii) Sadomasochistic abuse, meaning actual, simulated or animated flagellation, or torture by or upon a person who is nude or clad in undergarments or in a costume that reveals the pubic hair, anus, vulva, genitals, or female breast nipples, or in the condition of being fettered, bound, or otherwise physically restrained, on the part of one so clothed; or
>
> (iv) Actual, simulated, or animated touching, caressing or fondling of, or other similar physical contact with a

> public area, anus, female breast nipples, covered or exposed, whether alone or between humans, animals, or a human and an animal, of the same of opposite sex, in an act of apparent sexual stimulation or gratification; or
>
> (v) Actual, simulated, or animated stimulation of a human genital organ by an device whether or not the device is designed, manufactured, or marketed for such purpose.

throughout the film. It need not give the plot of the film not the applicant's opinion of whether the film had redeeming social value. **State v. B.G.N.O., Inc.**, supra.

We conclude the affidavit supplied sufficient information to convince the magistrate that the material was probably obscene. The Trial Judge did not err in denying Smith's motion to suppress.

Smith argues that the Trial Court erred in pretrial rulings when it refused to order the State to comply with

discovery requests. The defense requested information concerning the identity of the person or persons who viewed the film and found it obscene, offensive or appealing to the prurient interest, and the name of the individual determining the community standard on obscenity. In State v. Wrestle, Inc., supra, the defense sought similar information from the State concerning the community standard of "prurient appeal" and "patent offensiveness". The Louisiana Supreme Court upheld the Trial Court's refusal to order the State to produce the information, holding that the information related to issues of fact to be determined by the jury. Hence, the Trial Court ruling was correct.

Smith subpenaed a listing of all persons arrested and/or charged with a violation of R.S. 14:106 within the

previous 12 month period, as well as a listing of all arrests and all cases charged of whatever nature for the same period. As the Trial Court observed, the State has discretion in determining whom prosecute. The requested information bore no relevancy to Smith's case, and the State is not compelled by the discovery articles, C.Cr.P. arts. 716 et seq., to produce records containing that information. Moreover, the information requested constitutes public records available for inspection by Smith to the extent required by the Public Records Act-R.S. 44:9. Smith's third assignment is meritless.

Smith contends the Trial Court erred in another pretrial ruling when it refused to quash the bill of information which Smith contends is vague, ambiguous

and fails to specifically allege financial gain from his action or that the film arouses prurient interest. It is generally sufficient that an indictment state the offense charged in the words of the statute itself provided those words fully set forth the elements necessary to constitute the offense. **Hamling v. U.S.**, supra. The bill of information in this case states that Smith "did commit the crime of obscenity by selling, distributing, advertising or displaying obscene material, to wit: a Movie Entitled 'Lust at the Top' contrary to LSA-R.S. 14:06 (A) (3)." The verbiage of the bill tracks the language of the statute proscribing Smith's action, i.e. displaying the film, and directs the reader to the statute which defines "obscene material" as including work which appeals to the prurient interest.

Words defined by law are to be construed according to their legal meaning. C.Cr.P. art. 477. An allegation that the film is "obscene" sufficiently states the elements necessary to prove "obscenity" under the statute. As for the allegation of financial gain, the portion of the statute which Smith is charged with violating is silent as to financial gain. The Trial Court did not err in denying Smith's motion to quash and this assignment is meritless.

Smith's final assignment of error relates neither to trial nor pretrial motions but is an allegation that Smith was denied a fair and impartial trial because the State "summarily" challenged all male jurors from his jury. Citing no authority for this position, Smith apparently relies on **Batson v. Kentucky,**

476 U.S. 79, 106 S.Ct. 1712 (1986) which prohibits racially based exclusion of potential jurors. Smith attempts to extend the Batson holding to alleged gender discrimination.

Assuming that the **Batson** holding extends to gender biased exclusion, the facts of Smith's case do not show discriminatory jury selection under **Batson**. To establish a prima facie case of purposeful discrimination, Smith must initially show he is a member of a cognizable group and that the prosecutor has exercised peremptory challenges to remove members of this group from the jury; and secondly, show other relevant facts and circumstances which infer the prosecution used its peremptory challenges to exclude potential jurors based upon gender. The jury pool list indicates a random selection of potential

jurors, male and female. Of the first eleven persons on the list from which Smith's jury ultimately chosen, three were men and eight were women. The State used only three of its six peremptory challenges while Smith used two, leaving six unchallenged women who were ultimately selected as jurors. The State's action is hardly sufficient to show concerted discrimination against men. This assignment is meritless.

For the foregoing reasons, Smith's conviction and sentence are affirmed.

AFFIRMED

SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. 89-K -1261

TIMOTHY SMITH

IN RE: Smith, Timothy; - Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit. Number 88KA-1381; Parish of Orleans Criminal District Court Div. "J" Number 315, 431

October 13, 1989

Denied.

JCW

WFM

HTL

LFC

DIXON, C.J., CALOGERO & DENNIS, would grant the writ.

Supreme Court of Louisiana

October 13, 1989

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

STATE OF LOUISIANA (APPELLEE)

VERSUS

TIMOTHY SMITH (APPELLANT)

MOTION FOR EXTENSION OF TIME TO FILE WRIT OF CERTIORARI

To Joseph Spaniol, the Clerk of the Supreme Court of the United States:

Timothy Smith, the appellant in the above-entitled action, by Robert H. Belknap, his attorney of record, herein applies, pursuant to Supreme Court Rule 29(2), for an extension of time for filing his application for Writ of Certiorari for an additional twenty (20) days, namely, from December 12, 1989 to and including January 2, 1990.

The grounds for this application are

as follows: Robert H. Belknap, the above named attorney, has been involved in extensive litigation over the past several months and is the only attorney representing Timothy Smith in this proceeding. The transcripts from the court of the above-entitled action are not completed at this time. Mr. Belknap was also ordered to report for active duty with the United States Marine Corps Reserve from December 7, 1989 to December 10, 1989 in New Orleans, Louisiana and respectfully requests a twenty (20) day extension of time in which to file his application for Writ of Certiorari with the United States Supreme Court.

Attached to this Application is a copy of the denial of Writs by the Louisiana Supreme Court, the opinion of the Louisiana Court of Appeals and

minute entry of the trial court.

Dated December 11, 1989.

Submitted by:_____

Robert Belknap
Bar Roll Number 2916
631 St. Charles Avenue
New Orleans, Louisiana
(504) 5241436

CERTIFICATE OF SERVICE

I, Robert H. Belknap, a member of the Bar of the Supreme Court of the United States and counsel of record for Timothy Smith, appellant herein, hereby certifies that on December 12, 1989 pursuant to Rule 28, Rule of the Supreme Court, I served three copies of the foregoing motion for extension of time to file Writ of Certiorari on foregoing motion for extension of time to file Writ of Certiorari on each of the parties herein, as follows:

To the Honorable Harry Connick,

District Attorney, for the State of Louisiana, appellee herein, by depositing such copies in the United States Post office, addressed to the Honorable Harry Connick District Attorney, the above-named State of Louisiana, appellee's counsel of record, at 619 South White Street, New Orleans, Louisiana 70119.

All parties required to be served have been served.

Dated December 11, 1989.

Robert H. Belknap
Bar Roll Number 2916
631 St. Charles Avenue
New Orleans, Louisiana 70131
(504) 524-1436

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

STATE OF LOUISIANA (APPELLEE)

VERSUS

TIMOTHY SMITH (APPELLANT)

ORDER

CONSIDERING THE ABOVE FOREGOING Motion for Extension of Time to File Writ of Certiorari:

IT IS ORDERED that Robert H. Belknap, attorney for TIMOTHY SMITH, be granted an extension of time until the 2nd of January, 1990, in which to file an Application for Writ of Certiorari.

Washington, D.C., on this _____ day of December, 1989.

_____

UNITED STATES SUPREME COURT JUSTICE

EXTRACT OF JUDGE CHARGE

STATE OF LOUISIANA CRIMINAL DIST. COURT

VERSUS PARISH OF ORLEANS

TIMOTHY SMITH CASE NO.
SECTION "J"
VIO. R.S. 14:106

Transcript of CHARGE TO THE JURY given by the HON. LEON A. CANNIZZARO, JR. Judge Presiding, on November 13, 1986, during the TRIAL in the above-captioned matter.

APPEARANCES:

MS. DALE ATKINS, ESQ.; ASSISTANT DISTRICT ATTORNEY

MS. RHONDA SMITH, ESQ.; ASSISTANT ATTORNEY

MR. ROBERT BELKNAP, ESQ.; COUNSEL FOR THE DEFENDANT

REPORTED BY:

ELIZABETH C. SPONG
CERTIFIED SHORTHAND

E X A M I N A T I O N I N D E X

(NO INDEX IS NECESSARY)

BY THE COURT:

Ladies, the defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt....

...You are the exclusive judges of the facts. You alone shall determine the weight and credibility of the evidence. You are to find from the evidence which facts have been proved and which facts have not been proved....

...Ladies, as has been explained to you, the defendant is charged with the violation of the law of obscenity. I'm going to explain to you what we mean in law by "obscenity." The law of obscenity, as it applies to this case, is as follow:

"It is the intentional display of obscene material to the public for commercial gain. Obscene material is any tangible work or thing which the Jury determines; one, that the average person

applying contemporary community standards would find, taken as a whole, appeals to the purient interest; and, two, depicts or describes in a patently offensive way hard core sexual conduct; and, three, that the work or thing taken as a whole lacks serious literary, artistic, political, or scientific value."

When we refer to "contemporary community standards" we mean, that in determining whether the materials introduced at this trial or obscene or not, you are to consider what our local, general community standards are at large, at this time, are in this regard. Each juror is only entitled to draw on her personal knowledge of the view of the average person in the community, from which you come for making this required determination.

Witnesses may testify as to their

opinion--as to their individual opinions regarding what the community standards are, regarding what is or is not obscene; provided such witnesses are first shown to be qualified to form such an opinion.

The word "prurient", as is used in the term "prurient interests," is defined as; "inclined or inclining to lascivious thoughts, bringing about lasciviousness; that is, evilly desirous."

"Hard core sexual conduct" is the public portrayal, for its own sake and for ensuing commercial gain of, ultimate sexual acts, normal or perverted, actual or simulated, whether between human beings, animals, or an animal and a human being; or masturbation, excretory functions, or lewd exhibition, actual, simulated, or animated of the genitals, pubic hair, anus, vulva, or female breast nipples; or actual, simulated, or

animated touching, caressing, or fondling of, or other similar physical contact with a pubic area, anus, female breast nipple, covered or exposed, whether alone or between humans, animals, or a human and an animal of the same or opposite sex, in an act of apparent sexual stimulation or gratification; or actual, simulated, or animated stimulation of a human genital organ by any device, whether or not the device is designed or manufactured or marketed for such purpose."

In order to convict the defendant of the crime of obscenity, you must determine that the material introduced at trial is, in fact, obscene under our law. If you determine that it is not, you must return a verdict of not guilty. If you determine that the material is, in fact, obscene under our law, you must then

decide if the defendant is guilty of displaying the material to the public for its own sake and for ensuing commercial gain or profit on the date stated in the Bill of Information. It is not necessary that the State prove to you that the defendant was to benefit from or did benefit from any commercial gain derived from the display of obscene materials to the public. It is only necessary that the State prove that the display of obscene materials to the public was for the ensuing commercial gain of someone, be it different--be it the defendant or any other persons.

In order to convict a person of the public display of obscene material for profit, the State must prove that the person had knowledge or had reason to know of the character and nature of

the materials in question. The State need not show that the person knew the legal status of the materials to be obscene; that is, the State need not show that the person knew that the materials were legally obscene. It is sufficient that the State show that the person had knowledge of or had reason to know of the character and nature of the contents of the materials for distribution or display for which he was responsible.

The proof of this essential element may be by direct or circumstantial evidence.

In order to convict the defendant of the crime of obscenity, you must be convinced beyond a reasonable doubt that the material in question was obscene under our law, that the material was displayed to the public for profit, that

the defendant was intentionally involved on the date stated in the Bill of Information in the display of that material, and at that time the defendant knew or had reason to know of the nature and character of the contents of the materials in question.

Finally, I would like to instruct you on the law as it relates to experts. Experts are persons who possess special training, knowledge, or experience in a particular field, and they are permitted to express their opinion upon matters and issues which are related thereto. But such experts are not called into court for the purpose of deciding the case. You, the jurors, are the ones who, in law, must bear the responsibility of deciding the case. The experts are merely witnesses, and you have the right to either accept or reject

their testimony and opinions in the same manner and for the same reasons for which you may accept or reject the testimony of other witnesses in this case.

Ladies, the Defendant and the State are entitled to the individual opinion of each juror during deliberation, but any of you ladies may change your opinion as a result of reasonable persuasion by your fellow jurors. In this particular case, it requires that all six of you ladies agree on the verdict in order to render--in order to reach a legal verdict in this case. You're only going to have two options, "guilty or not guilty." When you go to the Jury room, I would ask that the first thing that you do is select a foreperson from among yourselves. The foreperson, of course, has no greater rights than any other

juror....

...Ladies, do you have any questions before I ask you to begin your deliberations?

(NEGATIVE RESPONSE)

(JURY OUT TO DELIBERATE)

C E R T I F I C A T I O N

I, ELIZABETH C. SPONG, CSR, OFFICIAL COURT REPORTER, HEREBY CERTIFY THAT THE FOREGOING SIXTEEN (16) PAGES OF THE JURY GIVEN BY THE HON. LEON A. CANNIZZARO, JR., DURING THE TRIAL IN THIS MATTER ON NOVEMBER 13, 1986, ARE TRUE AND CORRECT AND WERE TAKEN TO THE BEST

_____

ELIZABETH C. SPONG, CSR

COURT REPORTER

New Orleans, Louisiana

January 12, 1989

EXTRACT OF RELEVANT REQUESTED JURY CHARGES

JURY INSTRUCTIONS 1

INSTRUCTIONS AT BEGINNING OF TRIAL

SEE RECORD

JURY INSTRUCTION NO. 2

Role of the Court

SEE RECORD

JURY INSTRUCTION NO. 3

Juror Attentiveness

SEE RECORD

JURY INSTRUCTION NO. 4

Role of the Jury

SEE RECORD

JURY INSTRUCTION NO. 5

Juror Obligations

SEE RECORD

JURY INSTRUCTION NO. 6

Disregarding Unproven Allegations

SEE RECORD

JURY INSTRUCTION NO. 7

Conduct of Counsel

SEE RECORD

JURY INSTRUCTION NO. 8

Presumption of Innocence and Burden of Proof

SEE RECORD

JURY INSTRUCTION NO. 9

Reasonable Doubt

SEE RECORD

JURY INSTRUCTION NO. 10

Marshalling Evidence

SEE RECORD

JURY INSTRUCTION NO. 11

Direct and Circumstantial Evidence

SEE RECORD

DEFENDANT'S JURY CHARGE NUMBER 12

ACTS OF DEFENDANT

In order for you to find the defendant guilty, you must find that the government, beyond a reasonable doubt, proved to your satisfaction that the defendant participated or engaged in, or managed, operated, exhibited advertised, sponsored or displayed a movie which was obscene, and that he knew it to be obscene.

In order for the movie to be obscene, you again must again find that the government, beyond reasonable doubt, proved that the film to be obscene. In order for you to arrive at that decision, you must find that all of the following conditions were met by the government, and that those conditions were met beyond a reasonable doubt:

1). By applying contemporary

community standards, that the film, taken as a whole, appealed to the prurient interest, and

2). By applying contemporary community standards, that the film was presented in a patently offensive way;

3). That the film taken as a whole, lacked any literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas a work represents. That a reasonable person could not find any such value in the film.

In determining value of the film, you should remember that a reasonable person can find literature in Dada and art in the replication of a soup can. Miller v. California, 413 U.S. 15, Pope v. Illinois, 107 S. Ct. 1918 (May 87)

DEFENDANT'S JURY INSTRUCTION NO. 13

Obscene Material

The second element which the government must prove beyond a reasonable doubt is that the material charged in the indictment was obscene.

What is meant by obscene, lewd and lascivious, and what standards do you apply in deciding whether the language which was broadcast is of that character?

The words "obscene, lewd and lascivious," as used in the law, signify those materials which, taken as a whole, the average person, applying present-day community standards, would find appeals to prurient interests; that it depicts or describes, in a patently offensive way, sexual conduct; and that it lacks serious literary, artistic, political or scientific value.

Let me explain each of these

definitions in more detail. The words "taken as a whole" means that in determining whether the work at issue is obscene, it must be judged in its entirety. You are not to consider detached or separate portions in reaching a conclusion about whether the work is obscene. It is your task to determine whether, taken as a whole, it is obscene.

Similarly, you are to judge the work according to the standards of the average person in the present-day community. It is not your role to judge the work by your own personal standards [or by the standards of any particular class of people]. In this regard, you should take into account the community as a whole, the sensitive and insensitive, the educated and uneducated, the religious and non-observant, men and women from all walks of life in the community in which

you live (or in the community you find the language was intended to be broadcast). Also bear in mind that the law accepts the fact that the mores or the customs and convictions of people are not static. What is an acceptable code of morals or conduct today might well have been frowned upon in the past. Therefore, in reaching a conclusion as to whether or not material is obscene, you are to judge it by present-day standards of the community, or, for want of a better expression, by what may be termed the contemporary common conscience of the community.

Before you may judge the material in question obscene, you must find each of the following requirements: First, you must conclude that the work appeals to the prurient interests of those whom it is likely to reach. Prurient interest is

a shameful or morbid interest in sex or nudity. The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community--the young, the immature or the highly prudish--or, would leave another segment--the scientific or highly educated or so-called worldly-wise and sophisticated--indifferent and unmoved. In other words, you are first to determine whether it appeals to the prurient interest of the average person in the community.

The second component of obscenity you must find in accordance with the standards I have set forth is that the work depicts or describes, in a patently offensive way, sexual conduct. The Supreme Court of the United States has given the following examples of materials which may satisfy this requirement: (a)

patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. In short, before you may find the material in question to be obscene, you must determine that, taken as a whole, they constitute such examples of 'hard core' sexual conduct.

The third component of obscenity is that the work in question lacks serious literary, artistic, political or scientific value. This requirement finds its roots in the first amendment of the United States Constitution, which protects freedom of expression as a fundamental right in our society. Thus, the law does not condemn the portrayal of sexual conduct if, taken as a whole, the

work has serious social value. In determining this value you must again apply the standard of the ordinary reasonable person.

To reiterate, in order to find this third element has been satisfied, you must find, in accordance with present day community standards, that the work, taken as a whole, appeals to the prurient interest; that the work, taken as a whole, depicts or describes, in a patently offensive way, sexual conduct; and that the work, taken as a whole, lacks any value.

AUTHORITY

United States v. Hamling, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed. 2d 590 (1974); Miller v. California, 413 U.S. 15,, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973); United States v. 12 200 Ft. Reels of Film, 413 U.S. 123, 93 S. Ct. 2665, 37

L. Ed. 2d 500 (1973);

Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

United States v. Roth, 237 F. 2d 796 (2d Cir. 1956), aff'd, 354 U.S., 476 (1957).

DEFENDANT'S JURY INSTRUCTION NO: 14

Knowing and Willful Act

The third element the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully.

As I said before, an act is done knowingly if it is done voluntarily and intentionally, and not because of mistake, accident or other innocent reason.

An act is done willfully if done by the defendant knowingly and with an intention to violate or disobey the law, or if he knew or reasonably should have

known that he was committing a public wrong.

In this regard, it is not necessary for the government to prove that the defendant knew that the offending utterances were legally obscene or that he believed them to be, in fact, obscene.

AUTHORITY

United States v. Smith, 467 F. 2d 1126 (7th Cir. 1972).

Gagliardo v. United States, 336. F. 2d. 720 (9th Cir. 1966).

JURY INSTRUCTION NO: 15

SPECIFIC INTENT TO AROUSE

Specific intent to arouse sexual desire was an element of the offense of obscenity at the time of the occurrence.

AUTHORITY

STATE V. WASHINGTON, Sup. 1982, 412 So. 2d 991.

JURY INSTRUCTION NO: 16

EXTERNAL STANDARD

Community standards test is to emphasize need for external standard, as compared with trier of fact's personal views of decency, and to prevent evaluation of obscenity being based on whether material has an adverse effect on any particularly susceptible subclass of community.

AUTHORITY

STATE V. WRESTLE, INC., Sup. 1978, 360 So. 2d 831. affirmed in part, reversed in part on other grounds 99 S. Ct. 1623, 441 U.S. 130, 60 L.Ed. 2d 96, on remand 371 So. 2d 1165.

JURY INSTRUCTION NO: 17

SCIENTER

Determination of guilt of obscenity requires proof of scienter or knowledge.

AUTHORITY STATE V. WRESTLE, INC., Sup. 1978, 360 So. 2d 831, affirmed in part, reversed in part on other grounds 99 S. Ct. 1623, 441 U.S. 130, 60 L Ed. 2d 96, on remand 371 So. 2d 1165.
STATE V. ENTERTAINMENT SPECIALISTS, INC., Sup. 1980, 386 So. 2d 653.

JURY INSTRUCTION NO: 18

INTENDED AUDIENCE

If you find that the movie..."was to provide entertainment for men, and features were consistent with such philosophy, and each serious article bore name of an author, magazine did not, taken as whole, lack serious political or scientific or literary value beyond reasonable doubt, and was thus not obscene, even though it depicted hard-care sexual conduct which appealed to prurient interest and was patently

offensive.

AUTHORITY

STATE V. WALDEN BOOK CO., Sup. 1980, 386 So. 2d 342.

JURY INSTRUCTION NO: 19

MOVIE TO BE UTTERLY WORTHLESS

Content may be designed to appeal to prurient interest of average person but it is not necessarily obscene so as to fall outside constitutional safeguards unless it is utterly worthless, that is, unless it has not redeeming literary, artistic, historical or other merit whatsoever.

AUTHORITY

STATE V. HENRY, 1967, 250 La. 682, 198 So. 2d 889, reversed on other grounds, 88 S. Ct. 2274, 392 U.S. 655, 20 L. Ed. 2d 1343.

JURY INSTRUCTION NO. 20

Impermissible to Infer Participation from Association

You may not infer that the defendant was guilty of participating in criminal conduct merely from the fact that he associated with other people who were guilty of wrongdoing.

AUTHORITY

UNITED STATES V. TERRY, 702 F.2d 299 (2nd Cir.), cert. denied, 103 S. Ct.2095 (1983);

UNITED STATES V. JOHNSON, 513 F.2d 819 (2d Cir. 1978).

UNITED STATES V. PERRY, 624 F.2d 29 (5th Cir. 1980)

UNITED STATES V. XHEKA, 704 F.2d 974 (7th Cir. 1983);

UNITED STATES V. GARCIA, 562 F.2d 411 (7th Cir. 1977).

UNITED STATES V. RICHMOND, 700 F.2d 1183 (8th Cir. 1983).

RAMIREZ V. UNITED STATES, 363 F.2d 33 (9th Cir. 1966).

JURY INSTRUCTION NO. 21

OPINION AS TO CHARACTER OF WITNESS TO IMPEACH ANOTHER WITNESS' CREDIBILITY

SEE RECORD

JURY INSTRUCTION NO. 22

IMPEACHMENT OF REPUTATION TESTIMONY

SEE RECORD

JURY INSTRUCTION NO. 23

Opinion of Defendant's Character

SEE RECORD

JURY INSTRUCTION NO. 24

DEFENDANT'S REPUTATION

SEE RECORD

JURY INSTRUCTION NO. 25

Charts and Summaries (Not Admitted As Evidence)

SEE RECORD

JURY INSTRUCTION NO. 26

Charts and Summaries

SEE RECORD

DEFENDANT'S JURY CHARGE NUMBER 27

PURPOSE OF TEST

Purpose of community standards test is to emphasize need for external standard, as compared with trier of fact's personal views of decency, and to prevent evaluation of obscenity being based on whether material has an adverse effect on any particularly susceptible subclass of community.

AUTHORITY

STATE V. WESTLE, INC., Sup. 19798, 360 So. 2d 831, 99 S. Ct. 1623, 441 U.S. 130, 60 L. Ed. 2d 96, on remand 371 So. 2d 1165

DEFENDANT'S JURY CHARGE NUMBER 28

EMPLOYEES VERSUS OWNERS

It is necessary for State to prove that the employees either had "managerial duties" at the bookstore or had a "financial interest" other then his wages in tahe possession, exhibition or sale of ths materials; a mere employee may not be convicted under this section.

AUTHORITY

STATE V. TERREBONNE, Sup. 1977, 344 So. 2d 1010

DEFENDANT'S JURY CHARGE NUMBER 29

OTHER PROCEEDINGS

In prosecution for displaying and exhibiting obscene material, defendant may elicit testimony of other proceedings and undertake showing that community had a very premissive attitude toward sexually explicit material.

AUTHORITY

JURY INSTRUCTION NO. 30

Missing Witness Not Equally Available to Defendant

SEE RECORD

JURY INSTRUCTION NO. 31

Bias and Hostility

SEE RECORD

JURY INSTRUCTION NO. 32

Impeachment by Prior Inconsistent Statement

SEE RECORD

JURY INSTRUCTION NO. 33

TRIAL PERJURY

SEE RECORD

JURY INSTRUCTION NO. 34

Law Enforcement Witness

You have heard the testimony of a law enforcement official. The fact that

a witness may be employed by the federal government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lessor weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

AUTHORITY

BUSH V. UNITED STATES, 375 F.2d 602,

JURY INSTRUCTION NO. 35

Government Witness - Not Proper To Consider Guilty Plea

SEE RECORD

JURY INSTRUCTION NO. 36

Interest in Outcome

SEE RECORD

JURY INSTRUCTION NO. 37

Witness Credibility - General Instruction

SEE RECORD

JURY INSTRUCTION NO: 38

BURDEN OF PROOF

State bears burden of proving that material is obscene beyond reasonable doubt.

AUTHORITY

STATE V. LUCK, Sup. 1977, 353 So. 2d 225.

JURY INSTRUCTION NO. 39

SPECIFICITY OF BILL OF INFORMATION

"in such a manner that a part of his sex organ may have been seen" was fatally defective for failure to allege that act was committed "with the intent of arousing sexual desire."

AUTHORITY

STATE V. FONTENOT, 1970, 256 La. 12, 235 So. 2d 75.

Obscenity cannot be charged by short form indictment. Id.

AUTHORITY

STATE V. HENRY, 1967, 250 LA. 682, 198 SO. 2d 889, reversed on other grounds 88 S. Ct. 2274, 392 U.S. 655, 20 L. Ed. 2d 1343.

JURY INSTRUCTION NO: 40

ARBITRARY STANDARDS

No seizure of allegedly obscene

magazines, however well-meaning the purpose may be valid if it is product of an arbitrary, unreasonable rule of thumb.

AUTHORITY

LOUISIANA NEWS CO. V. DAYRIES, D.C. 1961, 187 F. Supp. 241.

..."bare breasts or bare buttocks", such standard was arbitrary, unreasonable, and did not meet federal constitutional due process requirements, and application of such criterion by state police officials infringed constitutionally protected rights of wholesale magazine distributors involved. Id.

AUTHORITY

STATE V. NEAL, Sup. 1973, 279 So. 2d 172.

JURY INSTRUCTION NO: 41

LAY TESTIMONY

In obscenity trials, community

In obscenity trials, community standards should be regarded as one of those facts on which a qualified lay witness, qualified by experience rather than by training, may give his opinion; however, party wishing to offer such opinion evidence must first demonstrate that witness is in fact qualified to give an opinion ad trial judge, in his discretion, may feel that a greater than usual threshold showing of "qualifications" is necessary. Id.

AUTHORITY

STATE V. GAMBINO, Sup. 1978, 362 So. 2d 1107, certiorari denied 99 S. Ct. 2042, 441 U.S. 927, 60 L. Ed. 2d 402.

JURY INSTRUCTION NO: 42

EXPERT TESTIMONY

Community standards are relevant to an obscenity prosecution and relevant

prove such community standards.

AUTHORITY

STATE V. SHORT, Sup. 1979, 368 So.2d 1078, certiorari denied 100 S. Ct. 174, 444 U.S. 884, 62 L. Ed. 2d 113.

JURY INSTRUCTION NO. 43

Corporate Responsibility

SEE RECORD

NO. 89-1300

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

TIMOTHY SMITH, PETITIONER

Versus

STATE OF LOUISIANA, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE FOURTH CIRCUIT
COURT OF APPEAL, STATE OF LOUISIANA

RESPONDENT'S BRIEF IN OPPOSITION

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MAY IT PLEASE THE COURT:

The respondent, State of Louisiana, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Fourth Circuit Court of Appeals for the State of Louisiana. That opinion is reported at 543 So.2d 555 (1989).

The facts of the case are adequately set out in the opinion of the Fourth Circuit (see petitioner's appendix, a-3, et seq.).

REASONS FOR DENYING THE WRIT

Comment is here offered to each of the five questions posed by petitioner:

> (1) "The trial court erred in not granting defendant's requested jury charges and the jury applied improper standards."

Petitioner's failure to contemporaneously object to the court's charge, or to suggest additional charges at the conclusion of the evidence, precludes the assertion of this error on appeal. See: Opinion below, pet. appendix, p.4; *State ex rel. Ross v. Blackburn*, 403 So.2d 719 (La. 1981); La. Code of Crim. Proc. Arts. 801 and 841.

Petitioner argues that the jury applied improper standards to the film. As the Fourth Circuit pointed out, the jury instructions prohibited the jurors from basing their verdict on personal values (opinion, app. 5). The jury was not instructed to rely upon personal values. There is no reason to conclude that the jury did base its determination on personal values. No substantial question is presented here.

> (2) "The search warrant issued in this matter was not properly sought or applied for and the court erred in not granting defendant's motion to suppress."

No substantial federal question is presented here. Petitioner's argument that the Magistrate must have an opportunity to evaluate the film as a whole before issuing a warrant is not supported by the decisions of this Court. See: *New York v. P. J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986).

(3) "The trial court erred in not ordering the prosecution to comply with requested defense discovery."

Petitioner's request for a listing of persons who viewed the film and found it obscene, and for a listing of all persons arrested for obscenity during the past year, was properly denied. No federal question is presented by the affirmance of the trial court's denial of an order that the state produce this information.

(4) "Appellant was denied a fair and impartial trial due to the prosecution's summary recusal of all potential male jurors."

This question is one of fact, which was resolved against petitioner by the Fourth Circuit (app., p. 10). The facts found by the court are not clearly error. No federal question is presented.

(5) "The court erred in failing to grant the motion to quash."

Petitioner here complains that the trial court did not quash the bill of informaiton, which petitioner contends is vague, ambiguous, and fails to specifically allege financial gain or that the film arouses prurient interest.

This claim was considered by the Fourth Circuit and that court held, in accord with the jurisprudence of this court, that the bill of information adequately charged petitioner. Pet. appendix, p. 9; *Hamling v. U.S.*, 418 U.S. 87, 94 S.Ct. 2887 (1974), reh. den. 419 U.S. 885, 95 S.Ct. 157.

This decision is not in conflict with federal jurisprudence.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Respondent's Brief in Opposition has been served upon counsel for petitioner by placing a copy in the United States Mail, postage prepaid and properly addressed to:

Robert H. Belknap
Attorney at Law
631 St. Charles Avenue
New Orleans, LA 70130

New Orleans, Louisiana,

this 7th day of May, 1990.

Jack Peebles pp cc
JACK PEEBLES,
COUNSEL FOR RESPONDENT